Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.

On Petition for Writ of Certiorari to
the Florida Third District Court of Appeal

Petition for Writ of Certiorari

Montgomery Blair Sibley
8511 Ziggy Lane
Gaithersburg, Maryland 20877
(202) 478-0371

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The Florida Third District Court of Appeal – the highest court of Florida in which a decision could be had in this matter – has now held that (i) it can invoke a waiver argument to determine an appeal which was not argued and from which relevant record evidence was excluded by that court and (ii) Petitioner can be barred from appearing *pro se* before that court. Accordingly, presented for review are three questions:

WHETHER the due process requirements of "notice" and "an opportunity to be heard" prohibit a state appellate court from invoking a waiver argument to determine an appeal when that argument was (i) not raised in the briefs or at oral argument before the court and (ii) failed to consider relevant record evidence excluded by the state appellate court?

WHETHER the Florida Third District Court of Appeal has violated Petitioner's fundamental right to access to court by its opinion which fails to find any instance of Petitioner filing frivolous, abusive or incomprehensible pleadings?

WHETHER, the Florida Third District Court of Appeal has violated Petitioner's fundamental right to access to federal court by sanctioning him "for pursuing his right to federal-court remedies" in violation of *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964)?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

Petitioner, Montgomery Blair Sibley, prays that a writ of certiorari issue to review the judgment and opinion of the Florida Third District Court of Appeal entered on November 3, 2004, which the Florida Supreme Court declined to review citing lack of jurisdiction on April 5, 2005. Review is mandated as the Florida Third District Court of Appeal has (i) far departed from the requisite course of due process, thus denying Petitioner's rights, privileges and/or immunities under the United States Constitution and (ii) denied to Petitioner his fundamental right to access to court for redress of his grievances.

OPINIONS BELOW

The November 3, 2004, decision of the Florida Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-2.* The December 8, 2004, panel decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-22.* The December 8, 2004, En Banc decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-24.* The April 5, 2005 decision of the Florida Supreme Court declining to accept jurisdiction is reprinted in the appendix hereto, *Appendix-25.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The original action was upon a petition for dissolution of marriage upon which a final judgment of dissolution was granted on September 20, 1994.

The course of proceedings relevant to this petition commenced on April 26, 2002, when Respondent made a motion to have Florida Circuit Court Judge Lando quantify the attorney fees ordered by the Third District Court of Appeal in cases numbered 3D01-2173 and 3D02-102 and in the federal court case styled *Sibley v. Sibley*, Case No.: 01-2770-CIV-Huck.

Prior to any hearing on that motion, on August 20, 2002, Petitioner filed his "Seventh Motion to Disqualify" Judge Lando. Judge Lando has never ruled upon the "Seventh Motion to Disqualify". On August 27, 2002, Judge Lando commenced and concluded an evidentiary hearing without benefit of a court reporter on Respondent's April 26, 2002, motion for attorney fees without issuing a ruling. Significant for this petition, during the hearing Petitioner orally advised Judge Lando of the pending and unresolved "Seventh Motion to Disqualify" filed seven days earlier. She refused to rule upon it but instead continued the hearing.

When Petitioner attempted to raise the pending "Seventh Motion to Disqualify" at a hearing before Judge Lando held on November 22, 2002, Judge Lando herself precluded Petitioner from raising the issue when she misrepresented on the

record that she was briefly adjourning the hearing so that Petitioner could consult with his counsel to raise whatever issues were unresolved. Instead, without resuming the hearing, she incarcerated Petitioner without re-convening the hearing.

Some 191 days later, on March 6, 2003, Judge Lando entered her "Order Granting Motion for Attorney Fees" from the August 27, 2002, hearing – again without addressing the still-pending "Seventh Motion to Disqualify" her. In the intervening 191 days, both Petitioner and the Florida Third District Court of Appeal provided notice to Judge Lando that the "Seventh Motion to Disqualify" was pending and unresolved before her.

On June 19, 2003, a hearing was held before Judge Wilson – who had replaced Judge Lando on January 30, 2003, as the assigned Judge to Division 19 to which the matter is assigned – on Respondent's motions to compel payment of attorney fees and contempt. On July 1, 2003, Judge Wilson entered his order from the June 19, 2003, hearing entitled "Order on Petitioner/Former Wife's Motion to Compel Payment of Attorney Fees" (i) holding Petitioner-here in contempt, and (ii) directing that Petitioner-here pay the $33,119.70 ordered by Judge Lando on March 6, 2003, within 60 days or Father would be sanctioned, including being incarcerated.

On August 4, 2003, Petitioner filed his notice of appeal of Judge Wilson's July 1, 2003, order finding Petitioner in contempt. That appeal was assigned Case Number: 3D03-2083 and it is from this case that this petition arises.

Importantly, in preparing the record on appeal for Case Number: 3D03-2083, Petitioner moved to settle the record of the hearing held before Judge Lando on August 27, 2002, at which he raised the issue of the pending and unresolved "Seventh Motion to Disqualify" Judge Lando. "The trial court declined to approve the statement of proceedings. [Petitioner] moved to compel Judge Lando (who conducted the August 27, 2002

hearing) to settle the statement of proceedings. See Fla. R. App. P. 9.200(b) (4). [The Florida Third District Court of Appeal] treated the former husband's motion to compel as a petition for writ of mandamus and, after receiving a response, denied it." *Appendix-9, infra.*

Ignoring that Judge Lando had been apprised of the pending Seventh Motion to Disqualify her (i) on August 27, 2002, and (ii) four times during September 2002 by Petitioner and the Florida Third District Court of Appeal and (iii) refused to permit notice to her at the November 22, 2002 hearing before her, the Florida Third District Court of Appeal materially misrepresented the record on appeal and held:

> The former husband argues that [Judge Lando] should not have heard the motion because at that time of the hearing the former husband's seventh motion to disqualify the trial judge was pending. We reject the former husband's argument, as the point has been waived. The former husband correctly argues that when a motion for disqualification or recusal is pending, it is the court's duty to rule on that motion before ruling on anything else. See *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000). Further, it is not necessary for the movant to request a hearing. See *id.* However, disqualification motions cannot be used for "gotcha" litigation tactics. See *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3d DCA 1979). In this case, the former husband and his counsel personally attended the hearing on the Emergency Motion. Nowhere in the transcript did they object that the hearing could not proceed until the court ruled on the pending motion for disqualification. A party cannot go to a hearing knowing that he has filed a motion for

> disqualification, make no mention of the pending motion, participate in the hearing, and then after receiving an unfavorable ruling, argue that the court must start over because there was a pending motion for disqualification. *Appendix-6.*

Additionally, during the pendency of the 3D03-2083, Respondent's counsel moved for sanctions stating:

> Undersigned counsel is no longer willing to sit by and watch this Court's limited resources be consumed by frivolous litigation, allow Respondent to pay funds to defend herself from Appellant's frivolous appeals and to allow his calendar to be placed in shambles as a result of the necessary filing of countless responses to Appellants appellate filings. Sanctions must be entered to limit Appellant's frivolous, baseless litigation pattern. Respondent requests that this Court refuse to accept further appeals from Appellant unless he is represented by counsel licensed to practice law in the State of Florida" (Respondent's Motion for Sanctions, page 2).

In response, Petitioner filed his response to the motion for sanctions on December 29, 2003. On March 9, 2004, Petitioner appeared to orally argue case Number: 3D03-2083 before a three-judge panel of that court which panel included Judges Juan Ramirez, Jr. and David L. Levy.[1] A subsequent oral

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[1] Judges Juan Ramirez, Jr. and David L. Levy subsequently disqualified themselves from 3D03-2083 upon Petitioner's allegations of improper *ex parte* communications with Respondent's counsel. This matter pends before this Court and is assigned Case Number: 04-1309. Additionally, the propriety of Judges Juan Ramirez, Jr. and David L. Levy's *ex*

argument was held before a new panel of judges: Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten. In both his written response and at both oral arguments, Petitioner raised his fundamental and constitutional[1] right to access court as grounds prohibiting the relief sought by Respondent. Moreover, the failure to make any finding of frivolousness and failure to give proper notice were also raised by Petitioner.

In its November 3, 2004, decision granting the motion for sanctions, the Third District stated in pertinent part:

> The former wife contends that the husband's appeals have repeatedly been shown to be without merit and have constituted an abuse of the legal process. Upon consideration of the motion, the former husband's response filed January 5, 2004, and after review of this court's files, we agree. . . .The former husband has served as an unending source of vexatious and meritless litigation. This has caused needless consumption of resources by the court system and needless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them. We conclude that the standards of *Lussy* are met. We have considered the criteria set forth in the *Safir* decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court.

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[1] communications with Respondent's counsel pends before the Florida Supreme Court as Case No.: SC04-2129 as an ethics complaint against Judges Juan Ramirez, Jr. and David L. Levy made by Petitioner. These matters explain the motive of the Third District Court of Appeal's retaliatory opinion against Petitioner in 3D03-2083.

Appendix-17.

On November 12, 2004, Petitioner made a motion for rehearing challenging the panel in 3D03-2083 to cite even one case brought before it in which Petitioner was deemed to have filed –either by the Court or Respondent – a frivolous, abusive or incomprehensible pleading. Notably, in denying the motion for rehearing on December 8, 2004, the panel was unable to so do.

In the interim, on November 26, 2004, Petitioner filed an action in the United States District Court for the Southern District of Florida against the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten in 3D03-2083 and the Clerk of the Florida Third District Court. That case was assigned Case Number: 04-22984-Civ-Jordan. Contemporaneously with the filing of that suit, Petitioner moved for Emergency Injunctive Relief to stop the Clerk of the Florida Third District Court of Appeal from following the orders of the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten (i) barring Petitioner from further filing in that court and (ii) dismissing the pending matters in which Petitioner was the appellant, petitioner or counsel to the appellant or petitioner.

On December 8, 2004, the Florida Third District Court of Appeal granted in part Petitioner's motion for rehearing permitting only that Petitioner could file his "Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court". A copy of that December 8, 2004, panel decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-22.* Additionally, on December 8, 2004, the Florida Third District Court of Appeal, sitting *en banc* denied Petitioner's motion for rehearing *en banc.* A copy of that opinion is reprinted in the appendix hereto, *Appendix-24.*

On March 5, 2005, Plaintiff's appeals in (i) Case Number 3D04-294 (Second Son's intervention appeal), (ii) Case Number 3D04-803 (Appeal of the March 27, 2004, Judge Wilson order

limited Father's right to appeal) and Case Number 3D04-1266 (Appeal of order disbursing funds upon *ex parte* communication) were dismissed by the Florida Third District Court of Appeal based upon its order in Case No. 3D03-2083. Hence, appellate review of those matters has terminated in the Florida Courts as the Florida Supreme Court has no jurisdiction to review dismissed appeals without written explanation. *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002)

Additionally, on April 5, 2005, the Florida Supreme Court decline to review the Florida Third District Court of Appeal's holding in Case No. 3D03-2083. A copy of that decision of the Florida Supreme Court declining to accept jurisdiction is reprinted in the appendix hereto, *Appendix-25.*

On April 12, 2005, after oral argument but denying Petitioner an evidentiary hearing, Judge Jordan issued his Order Denying the Motion for Temporary Injunction. A copy of the April 12, 2005 Order Denying Motion for Temporary Injunction is reprinted in the appendix hereto, *Appendix-26.* Primarily, Judge Jordan denied the motion finding that he lack jurisdiction under the so-called *Rooker-Feldman* doctrine.

REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting the writ to review the decision of the Florida Third District Court of Appeal in Case Number 3D03-2083.

First, due process considerations, bound upon Florida by the Fourteenth Amendment, require notice and an opportunity to be heard prior to a decision being rendered by a court. Here, Petitioner was not afforded that opportunity as neither the appellate briefs nor the oral arguments raised the issue of "waiver" of the Seventh Motion to Disqualify, and accordingly, the Third District Court of Appeal's invocation of that doctrine without affording Petitioner and opportunity to be heard cannot stand.

Second, Petitioner's fundamental right to access to court for redress of his grievances cannot be curtailed – as the Florida Third District Court of Appeal has done here – without a showing of frivolous, abusive or incomprehensible behavior by a litigant.

Third, the Florida Third District Court of Appeal may not sanction Petitioner – as it has done here – "for pursuing his right to federal-court remedies" in violation of *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964).

I. Petitioner Was Denied Notice and An Opportunity to Be Heard on the Issue of Waiver of the Seventh Motion to Disqualify

This Court has recognized that an appellate court cannot sit as a jury and determine matters not noticed or raised on appeal. In *S.E.C. v. Chenery Corp.*, 318 U.S. 80; 63 S.Ct. 454; 87 L.Ed. 626 (1943), this Court held:

In confining our review to a judgment upon the

> validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. **But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.** (Emphasis added).

Here, this is exactly what the Third District Court of Appeal has done by denying to Petitioner "an opportunity to be heard" on whether there has been a "waiver" of the Seventh Motion to Disqualify Judge Lando. Indeed, this failure to accord Petitioner such an opportunity was further compounded when the Florida Third District Court of Appeal refused to permit Petitioner to introduce evidence in the record which would have factually precluded the finding of a "waiver".

II. The Right Of Access To The Courts To Seek Legal Remedy Is A Fundamental Right Secured By The Due Process Clause

The right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law rooted in the *Magna Carta*. It is among the most important of

the rights and liberties of the common law that Americans guaranteed for themselves under the Due Process Clause as well as the First Amendment.

As Justice Powell observed:

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Ingraham v. Wright, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Among those essential privileges is the right to obtain redress from the courts. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that the U.S. Supreme Court has held that the Fourteenth Amendment includes "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The origins of that right, and its exercise free from improper interference by the judiciary – as the Florida Third District Court of Appeal has done to Petitioner here – are firmly rooted in the *Magna Carta* of 1215. The barons at Runnymede, determined to end the king's manipulation of the courts for his own purposes, particularly through the sale of writs, compelled King John to vow in Chapter 40: "To no one will we sell, to no one will we refuse or delay, right or justice." The re-issued *Magna Carta* in 1225 combined this provision with the seminal due process guarantee of Chapter 39 into Chapter 29. In the words of Sir Edward Coke, Chapter 29 guaranteed that, "every subject of this realme, for injury done to him...by any other subject... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay." Edward Coke, *The Second Part of the Institutes of the Laws of England* 55 (London, E.&R. Brooke 1797).

Nearly everything the drafters of the United States Constitution understood of this principle was learned from Coke. His explication of the *Magna Carta*, first published in 1642, was widely read by the Founding generation. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"); Dick Howard, *The Road from Runnymede* 119-25 (1968).

Moreover, Lord Coke's explication of Chapter 29 was restated with approval by William Blackstone, whose treatise was also widely studied by 18th Century Americans. William Blackstone, *Commentaries on the Laws of England,* 141 (1765). Coke elevated the *Magna Carta* to its status as the source of all the fundamental principles of the common law, in which all the rules familiar to common law lawyers are grounded. Coke vigorously asserted the primacy of these principles as a limitation on the power of all government.

Intervention to close the courthouse doors – as the Florida Third District Court of Appeal has done to Petitioner – to prevent litigants from walking through them threatens the ability of the judicial branch to perform its constitutional function.

The degree to which this right is deemed fundamental to the American system of justice is reflected in the fact that 38 states – Florida notably among them at Florida Constitution, Article I, §2 – have incorporated in their state constitutions provisions guaranteeing the right of access and remedy patterned after Coke's language. See David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev., 1197, 1201 n. 25 (1992) (listing state constitutional provisions).

Although the U.S. Constitution does not contain a similar express guarantee, the adoption by the First Congress of the Fifth Amendment's guarantee of due process was an "affirmation of Magna Charta according to Coke." *Haslip* at 29 (Scalia, J., concurring). This Court has left no doubt that access to the courts is a fundamental right guaranteed by the U.S. Constitution:

(i) The Article IV Privileges and Immunities Clause - *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148, 52 L. Ed. 143, 28 S. Ct. 34 (1907); *Blake v. McClung*, 172 U.S. 239, 249, 43 L. Ed. 432, 19 S. Ct. 165 (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873);

(ii) The First Amendment Petition Clause - *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972);

(iii) The Fifth Amendment Due Process Clause - *Murray v. Giarratano*, 492 U.S. 1, 11, 106 L. Ed. 2d 1, 109 S.

Ct. 2765, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985);

(iv) The Fourteenth Amendment Equal Protection Clause - *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), and

(v) The Fourteenth Amendment Due Process Clause - *Wolff v. McDonnell*, 418 U.S. 539, 576, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380-381 (1971).

A. A Litigant Must Egregiously Trespass Upon the Right To Access Before That Right May Be Impinged

Against this bedrock principal of fundamental right of access to the courts for redress, a limited exception has evolved in cases in which there is a showing of egregious abuse of the judicial process by a litigant. Those limited exception spring from instances when the litigant's pleadings are either (i) frivolous, (ii) abusive or (iii) incomprehensible.

At the federal level, that level of egregious abuse has been recognized when a petitioner filed "4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief, and 10 petitions for rehearing" all of which this Court recognized were "frivolous requests." *In re Jessie McDonald,* 489 U.S. 180, 181 (1989). Likewise, in *Judd v. United States Dist. Court for Western Dist. of Texas,* 528 U.S. 5, 6 (1999) this Court entered sanctions when "Judd had filed six petitions for certiorari, all of which were both **frivolous and had been denied without recorded dissent**. Since the Rule 39.8 denial, Judd has filed four petitions for certiorari, all of which were also **frivolous and denied without recorded**

dissent. The instant petition for certiorari thus brings **Judd's total number of frivolous filings to 12.**" (Emphasis added). Indeed, a clear finding of "frivolousness" is at the heart of the extreme sanction of limited access to court. *Accord*: *Martin v. Dist. of Columbia Ct. of Appeals*, 506 U.S. 1 (1992)("[A]ll of Martin's filings, including those before us today, have been demonstrably frivolous.")

At the Circuit Court level, in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), the Eleventh Circuit found that Procup had "filed 176 cases in the Jacksonville Division of the Middle District of Florida alone, not counting suits filed in other federal and state courts. Most of Procup's suits have been *pro se*, in forma pauperis civil rights actions under 42 U.S.C.A. Sec. 1983. None has reached the stage of trial on the merits; **most have been frivolous.** Procup often has filed repeated claims and failed to comply with court rules and procedures. His pleadings are long and rambling. He has ignored repeated warnings and admonitions from the district court." *Id.* at 1070.

Nonetheless, the 11th Circuit, in vacating the injunction identical to the injunction issued by the Florida Third District Court of Appeal against Petitioner, recognized that the District Court's injunction:

> . . . that Procup file suits only through an attorney may well foreclose him from filing any suits at all. A private attorney, knowing Procup's track record, might well be unwilling to devote the time and effort necessary to sift through Procup's generally frivolous claims to see if there is one of sufficient merit to undertake legal representation. A legitimate claim could well go undiscovered. Moreover, due to Procup's shotgun litigation techniques, attorneys in the legal services office already have found themselves as defendants in Procup's rambling pleadings. This

> not only would deter an attorney from representing such a difficult client, but also raises the possibility that, due to intra-office conflicts of interest, the legal services attorneys would be unavailable to represent Procup. **With the premise that Procup would simply be unable to get any attorney to represent him, the injunction then effectively enjoins Procup from filing any suit.** . . . An absolute bar against a prisoner filing any suit in federal court would be patently unconstitutional. **We, therefore, vacate the injunction and remand for consideration of such modification as will, as much as possible, achieve the desired purposes without encroaching on Procup's constitutional right to court access.** (Emphasis added).

Id. at 1071. *Accord*: *Green v. Carlson*, 649 F.2d 285, 287 (CA5 1981)("Flagrant abuse of the judicial process can enable one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. See Camper, 477 F.Supp. at 770-71. The same pattern of malicious and frivolous filings is now apparent in this Circuit. Recognizing the need to curtail further frivolous and malicious filings, this Court will invoke its general supervisory power to control its docket."); *In re Martin-Trigona*, 737 F.2d 1254, 1261 (CA2 1984) ("Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions. . . .").

In *Safir v. United States Lines, Inc.*, 792 F 2d. 19 (2nd Cir. 1986) the seminal holding of that case was that "Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Id.* at 24. In *Safir*, the court found that as a matter of fact that vexatious litigation

included:

> Safir's somewhat novel litigation tactics can only be characterized as senseless and unduly burdensome. He moved to dismiss one appeal on the ground that the defendants had conspired to bribe President Nixon to defeat his litigation. He also sought to discover the "Nixon tapes" in the belief that officials in the Nixon administration conspired with the defendants to prevent him from vindicating his rights. In another action, he sought to have the judge disqualified because he allegedly was a friend of President Nixon. Similarly, Safir has sought collateral relief *pendente lite* in many of his actions, including this one, alleging that the defendants were dissipating their assets to prevent him from enforcing potential multi-million dollar judgments. In this regard, he has sought to enjoin the sale of ships, shares of stock and other assets and to have proceeds of such sales placed in escrow; to enjoin a stockholder's meeting; and to enjoin the government from paying subsidies to the defendants and from approving the sale of stock in which neither the buyer nor the seller were defendants in Safir's actions. In light of the patently meritless nature of these motions, they can be viewed only as attempts by Safir to harass the defendants. Another example of such harassing and baseless litigation was more recently displayed when Safir brought involuntary bankruptcy proceedings against four of the defendants. That action was predicated on the untenable theory that because Safir was about to win prodigious judgments from the defendants, they would be unable to satisfy the claims and be forced into bankruptcy. The

> bankruptcy court found Safir's petition to be a clear abuse of the judicial process, and assessed costs and attorneys' fees against Safir.

Id. at 25.

Plainly, before a court may step in and limit a litigants's fundamental right to access to court, egregious behavior must be found to have existed and be expressly documented by the sanctioning court. "Demonstrably frivolous" is the standard that must be met. *Martin* at 2.

As shown below, no such behavior by Petitioner can be found in any of his twenty-five appeals. As such, it is a violation of Petitioner's fundamental right to access court for the Third District Court of Appeal to *ex cathedra* ban Petitioner from their court.

B. The Florida Third District Court of Appeal Did Not Make the Requisite Findings of Fact That Petitioner's Appellate Matters Were Frivolous, Abusive or Incomprehensible.

Based upon the foregoing, it is plain that before a litigant may be barred from court as Petitioner was barred here, the court must make findings of fact – grounded in fact – that a litigant's pleadings were (i) frivolous, (ii) abusive or (iii) incomprehensible. This, the Florida Third District Court of Appeal neither did nor could do. As such, their order of November 3, 2004, impermissibly trespassed upon Petitioner's fundamental right to access to court.

The sum total of facts recited by the panel to justify the sanction imposed upon Plaintiff was grounded in three areas.

1. **Petitioner's Motive** - First, an un-cited, undated, out of context quote attributed to Petitioner in a eight year old letter to his former wife. Besides the lack of notice of utilization of such quote as discussed *infra*, the *ad hominem* attempt by the panel to impute an improper motive to Petitioner is irrelevant to considerations here. Regardless of the subjective intent of a litigant in pursuing litigation, it can only be the objective consideration of the frivolousness of the pleadings that must be utilized to determine whether sanctions should be imposed. To hold otherwise opens the door for a court to subjectively impute to a litigant *mala fides* and, notwithstanding objectively non-frivolous pleadings, make the determination that such intent justifies barring the courthouse door to a litigant.

2. **Lack of Merit** - Second, after listing Plaintiff's twenty-five matters filed in the Third District Court of Appeal, the panel simply concludes – without citation to any of the decisions in those matters – that "the former husband's subsequent *pro se* proceedings in this court have been found to have no merit. As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so." *Appendix-12.*

Notably, the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten do not state – as they could not – that any of those twenty-five matters were (i) frivolous, (ii) abusive or (iii) incomprehensible.

Instead, they make the conclusory statement that the twenty-five matters "have not merit". The "have not merit" determination has never been a criteria for denying a litigant access to the court. If it were, then every litigant who does not prevail on an appeal would be subject to denial of access to the court. Moreover and of note, none of the twenty-five matters was dismissal for lack of jurisdiction or for frivolous filings.

Perforce, a review of those twenty-five matters reveals that in all but three of them, the decision of the panels were *per curiam* without written opinion. Hence for the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten to speculate upon the "merits" of those appeals is an *ex post facto* exercise undertaken towards an apparently foregone conclusion.

Indeed, as one court has noted, "In rendering the decree for the plaintiff, the chancellor stated that he relied on the *per curiam* decision of *Hoffman v. Drennen*, Fla.1956, 88 So.2d 624. This was a decision without opinion affirming a decree. We are of the view that such a decision does not establish any point of law; and there is no presumption that the affirmance was on the merits." *Schooley v. Judd,* 149 So.2d 587, 590 (Fla.App. 2 Dist. 1963). As such, even if lack of merit were a basis to deny access to court, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten were simply speculating as to the merits of the twenty-one cases decided *per curiam* without written opinion, many of them issued by panels upon which they were not sitting. Speculating by judges as to the reasons other matters were determined is no basis for denying Petitioner his fundamental right to access to court.

Moreover, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten in a blaring example of infidelity to the impartial consideration of all the facts fail to note in their opinion that in not one of Petitioner's twenty-five appeals were sanctions imposed upon Petitioner by the various panels under Rules of Florida Appellate Procedure, Rule 9.410. That rule authorizes the court to "impose sanctions for any violation of these rules, or for the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith."

As to the second statement – "As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so" the panel judges Gerald B. Cope, Jr., Melvia B. Green and

David M. Gersten's conclusory statement is simply wrong. In fact, in their decision of November 3, 2004, there is only one reference to an attempt by Petitioner to "re-litigate matters decided in earlier proceedings"– the March 4, 2003, order of the circuit court – calling into question the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten's reckless use of the plural "matters" when accuracy demands that the singular "matter" be utilized.

3. **Petitioner's Federal Actions** - Finally, the twelve actions in federal court cited by the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten are of no moment in their determination of the sanction imposed here.

First, noteworthy is that – with one exception – Federal Rule of Civil Procedure, Rule 11 sanctions were not imposed on Petitioner by the federal courts which heard these matters resulting in the obvious conclusion that these matters were not frivolous.

Indeed, in two of them Plaintiff made significant federal law.[2] Moreover, as noted by the panel judges Gerald B. Cope,

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[2] In *Sibley v. Schwartz*, Case No.: 01-3746-Civ-King, *affirmed*, No. 01-16571 (11th Cir. 2001), contrary to Judge King's holding that Defendant Judge Lando enjoyed absolute judicial immunity, the Eleventh Circuit held for the first time in this circuit that "[a]lthough absolute judicial immunity shields state court judges from suits seeking damages for acts taken in their judicial capacity, 'judicial immunity is not a bar to prospective injunctive relief' in 42 U.S.C. § 1983 suits against judicial officers acting in their judicial capacity. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)."

Additionally, in *Sibley v. Lando*, Case No.: 03-21885-Civ-Huck, *rev.* No. 03-14910 (11th Cir. 2004), the 11th Circuit,

Jr., Melvia B. Green and David M. Gersten, all but one of the remaining nine federal suits were dismissed as an act of abstention discretion by the federal courts under *Rooker-Feldman* and *Younger* doctrine principles.

III. Petitioner May Not Be Sanctioned In State Court for Asserting his Federal Rights

The Florida Third District Court of Appeal held

> In addition, the former husband has filed at least twelve actions in federal court against judges who have been assigned to his cases, the court system, and the former wife. . . . The former husband has served as an unending source of vexatious and meritless litigation. This has caused needless consumption of resources by the court system and needless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them. We conclude that the standards of *Lussy* are met. We have considered the criteria set forth in the *Safir* decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court." *Appendix-13.*

Such a holding clearly impinge on the right to access

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reversed the dismissal of the lawsuit Plaintiff brought against Judge Lando for her unlawful imprisonment of him and reinstated the matter holding "For the foregoing reasons we find that the district court (1) erred when it applied the *Rooker-Feldman* doctrine as a jurisdictional bar to Sibley's claims; (2) abused its discretion when it abstained from hearing Sibley's claims under the *Younger* doctrine."

federal courts recognized in *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), where this court unequivocally stated:

> Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they resented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. **That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise.** (Emphasis added).

Hence, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten have sanctioned Petitioner in state court because he sought relief in federal court as was his right under federal access to court guarantees. By doing so, panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten have violated the proscription against such action by a state court under *Donovan.*

In particular, as noted in footnote #2, *supra*, two of the federal suits Petitioner filed were anything but frivolous.

Moreover, the Florida Third District Court of Appeal has sanctioned Petitioner for exercising his right to remove a state matter to federal court as guaranteed by 28 U.S.C. §1441. In *Sibley v. Sibley,* United States District Court, Southern District of Florida Case No. 01-1349, as a matter of discretion, Judge

Gold returned the matter to the Florida Court under *Younger* abstention principals, Petitioner's right to seek such a removal cannot be punished by the Florida Courts as done here without doing violence to the holding of this Court in *Donovan.*

Indeed, what the Florida Third District Court of Appeal has reserved unto itself – now without possibility of review save by this Court – is the right to bar a litigant not because his pleadings are frivolous, abusive or simply incomprehensible but solely because a litigant is zealous to the point of litigiousness. As repeatedly recognized by the Federal Circuit Courts, litigiousness alone will not support an injunction restricting filing activities. *Accord*: *In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982); *Pavilonis v. King*, 626 F.2d 1075, 1079 (1st Cir.), *cert. denied*, 449 U.S. 829(1980); *Castro v. United States*, 775 F.2d 399, 408 (1st Cir. 1985); *Ruderer v. United States*, 462 F.2d 897, 899 (8th Cir.), *cert. denied*, 409 U.S. 1031(1972).

CONCLUSION

Accordingly, this Court must review the decision of the Florida Third District Court of Appeal in 3D03-2083 as (i) Petitioner has no right to review in the United States District Court under the *Rooker-Feldman* doctrine as applied by Judge Jordan in his Order Denying the Motion for Temporary Injunction and (ii) Petitioner's right to access court will be destroyed by the Florida Third District Court of Appeal's expanded authority to bar litigants from its court based only upon a litigant's " litigiousness".

Respectfully submitted,

Montgomery Blair Sibley
Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED

041411 APR 10 2005

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.

On Petition for Writ of Certiorari to
the Florida Third District Court of Appeal

Appendix to Petition for Writ of Certiorari

Montgomery Blair Sibley
8511 Ziggy Lane
Gaithersburg, Maryland 20877
(202) 478-0371

Counsel for Petitioner

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IN THE DISTRICT COURT OF APPEAL OP FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 2004
NOVEMBER 3, 2004
CASE NO.: 3D03-2083
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,

Appellant,

v.

BARBARA SIBLEY,

Appellee.
_____/

An Appeal from the Circuit Court for Miami-Dade County, Thomas S. Wilson, Jr., and Maxine Cohen Lando, Judges, LOWER TRIBUNAL NO. 94-18177

Montgomery Blair Sibley, in proper person. Jay M. Levy; Bette E. Quiat, for appellee.

Before COPE, GERSTEN and GREEN, JJ.

PER CURIAM.

Montgomery Blair Sibley (the former husband) appeals two post-judgment orders entered after dissolution of marriage. Final judgment in the dissolution action was entered in 1994 and there have been numerous post-judgment proceedings since that time. In this proceeding, the former husband appeals orders compelling payment of attorney's fees and tuition. We affirm those orders.

The former wife requests an order precluding the former husband, an attorney, from representing himself in further appeals in this court. We grant the request.

I.

The former husband appeals an order entered on July 1, 2003 ("the July 1 order") which required the former husband to pay the former wife, Barbara Sibley, $33,119.70 in attorney's fees within sixty days. This order enforced earlier attorney's fee awards which had already been entered against the former husband in prior proceedings.

On this appeal, the former husband argues that one of the underlying attorney's fee orders was entered in error and that the trial court erred in enforcing it. This argument is without merit.

The underlying attorney's fee order which the former husband is trying to attack was entered on March 4, 2003 ("the March 4 order").[1] The former husband appealed the March 4 order to this court, arguing procedural error. This court affirmed without opinion. *Sibley v. Sibley*, 866 So.2d 1223 (Fla. 3d DCA 2003) (table), *cert. denied*, 124 S.Ct. 2909 (2004). Since the former husband already appealed the March 4 order and this court already affirmed it, common sense and principles of res judicata dictate that the former husband cannot now mount a second appeal of the March 4 order.

The former husband argues that a successive attack on the March 4 order is allowed as a result of the Florida Supreme Court's decision in *Florida Department of Transportation v. Juliano*, 801 So.2d 101 (Fla. 2001) . The former husband misunderstands the import of that decision. The *Juliano* case explains the law of the case doctrine, where there has been an interlocutory appeal followed by a later appeal from a final judgment. See *id* . at 106.

The *Juliano* decision does not apply here. The March 4 order was a final order awarding attorney's fees and it was appealed as a final order. The March 4 order is res judicata.

This court has explained that res judicata applies where, as here, there have been multiple final orders in post-dissolution proceedings.

> [I]t does not matter that the issue-preclusive effect of the earlier adjudication is asserted later in the same case, rather than in separate, subsequent litigation. Probably because res judicata principles in general apply only to final, appealable determinations, see 33 Fla. Jur. 2d *Judgments & Decrees* § 173 (1994), and successive final judgments in the same case are at least unusual, see *Del Castillo v. Ralor Pharmacy, Inc.*, 512 So.2d 315 (Fla. 3d DCA 1987), it is true that the principle is often broadly and imprecisely stated as applying in subsequent "suits" or "actions." See 32 Fla. Jur. 2d *Judgments and Decrees* § 140. Nevertheless, when there is indeed a final earlier adjudication, its "effect ... as res judicata is not confined in its operation to subsequent independent proceedings, but also applies to all collateral proceedings in the same action."

Utterback v. Starkey, 669 So.2d 304, 305 (Fla. 3d DCA 1996) (footnotes and citations omitted).

The former husband argues that it would work a manifest injustice for this court to enforce the March 4 order. The Florida Supreme Court "has long recognized that res judicata will not be invoked where it would defeat the ends of justice." *State v. McBride*, 848 So.2d 287, 291 (Fla. 2003) (citations omitted).

The former husband argues that it would be a manifest injustice to enforce the March 4 order because the prior panel which affirmed the March 4 order did not write an opinion explaining the panel's reasoning. In the former husband's view, the prior panel was mistaken and should have written an opinion to explain the ruling. This is not a legally sufficient showing of manifest injustice. The district courts of appeal are allowed to issue affirmances without opinion. See *R.J. Reynolds Tobacco Co. v. Kenyon*, 29 Fla. L. Weekly S 462 (Fla. Sept. 2, 2004) .

The former husband argues that the claimed procedural errors in the entry of the March 4 order render the March 4 order void. The former husband moved for relief from judgment under Florida Rule of Civil Procedure 1.540, with respect to the March 4 order and relief was denied by the successor judge, Judge Wilson. That order is one of the orders on appeal herein. However, the former husband has not demonstrated any error in the order denying Rule 1.540 relief.

II.

The former husband next appeals a July 17, 2003 order compelling him to reimburse tuition expenses for two of the parties' children.

Under the parties' marital settlement agreement, the former husband is responsible for payment of educational expenses through college. See *Sibley v. Sibley*, 816 So.2d 136 (Fla. 3d DCA 2002).

The children are also beneficiaries of trusts set up for their benefit. A guardian ad litem currently serves as the trustee of those trusts. When the former husband has failed to pay tuition, the trusts have made those payments. However, where that has happened, the trustee has requested that the trusts be reimbursed.[2]

In February 2003 the former wife filed a motion entitled "Emergency Motion to Permit Payment of Deposit for Minor Child, Montgomery Blair Sibley, Jr., at Palmer Trinity [School] and Summer School Tuition for Margaret Harper Sibley and Emergency Motion for Contempt for Failure to Pay Life Insurance Premium." ("the Emergency Motion").

After conducting hearings on March 10 and April 7, 2003, the trial court granted the tuition-related requests. The trustee was authorized to pay the tuition amounts. That part of the order is not challenged on this appeal.

The July 17 order also required former husband to reimburse two of the trusts, in the amounts of $18,130 and $7,207.50, respectively.

The former husband argues that the trial court should not have heard the motion because at that time of the hearing the former husband's seventh motion to disqualify the trial judge was pending.

We reject the former husband's argument, as the point has been waived. The former husband correctly argues that when a motion for disqualification or recusal is pending, it is the court's duty to rule on that motion before ruling on anything else. See *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000). Further, it is not necessary for the movant to request a hearing. See *id.*

However, disqualification motions cannot be used for "gotcha" litigation tactics. See *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3d DCA 1979) . In this case, the former husband and his counsel personally attended the hearing on the Emergency Motion. Nowhere in the transcript did they object that the hearing could not proceed until the court ruled on the pending motion for disqualification.

A party cannot go to a hearing knowing that he has filed a motion for disqualification, make no mention of the pending motion, participate in the hearing, and then after receiving an unfavorable ruling, argue that the court must start over because there was a pending motion for disqualification.

"The well-settled proposition is that the law does not favor the substitution of a Judge or Justice in a cause after decision which essentially carries a benefit to the successful party." *Lawson v. Longo*, 547 So.2d 1279, 1281 (Fla. 3d DCA 1989) (quoting Ball v. Yates, 29 So.2d 729, 735 (Fla. 1946). In Lawson

> the seller waited, having knowledge of the alleged ground for recusal from the second day of trial, until well after final judgment, which was adverse to him. By doing nothing to affirmatively promote or protect the issue of the possible recusal, the seller can be said to have sat on his rocking chair, watching the trial meander by. It is now too late and he has shown no good cause for delay.

Lawson, 547 So.2d at 1281; see also *Fisher v. Knuck*, 497 So.2d 240, 243 (Fla. 1986) ("A motion for recusal is considered untimely when delayed until after the moving party has suffered an adverse ruling unless good cause for the delay is shown.")

The former husband relies on *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000), but that case is not on point. In *Fuster-Escalona* there was never a hearing on the motion for disqualification. That case addressed how to treat a disqualification motion for purposes of the rule regarding dismissal for lack of prosecution. *Id.* at 1064-65. It did not involve a situation like the one now before us, where a party participated in a hearing without objecting that there was a pending disqualification motion.

The former husband relies on the thirty-day rule established by *Tableau Fine Art Group, Inc. v. Jacoboni*, 853 So.2d 299 (Fla. 2003), but reliance on that case is misplaced. In *Tableau* the Florida Supreme Court announced that a motion for disqualification must be ruled on by a trial court within thirty days. *Id.* at 303. If there is no ruling within thirty days, then disqualification is automatic. See *id.* at 301. The former husband argues that his seventh motion for disqualification was pending for more than thirty days and therefore Judge Lando should have been disqualified. However, the thirty-day rule of *Tableau* is prospective only, and came into effect only for motions for disqualification filed on or after August 20, 2003. See *City of Hollywood v. Witt*, 868 So.2d 1214, 1218 n. 6 (Fla. 4th DCA 2004) . The seventh motion for disqualification had been filed prior to that date. Thus, the thirty-day rule is inapplicable to the former husband's seventh motion for disqualification.[3]

III.

The former husband next argues that the July 17 order erroneously holds him in contempt when no motion for contempt was made. The former husband is incorrect. He was not held in contempt.

The former wife filed the Emergency Motion described previously. The court authorized (a) the guardian ad litem, as trustee, to pay the educational expenses for the two children; (b) ordered the former husband to reimburse the two trusts $18,130 and $7,207.50, respectively; and (c) reserved jurisdiction on the issues of contempt and attorney's fees for a subsequent hearing.

The reservation of jurisdiction on the issue of contempt apparently refers to the former wife's second request in her motion, which was never reached by the trial court: her request to hold the former husband in contempt for failure to pay a life insurance premium.[4]

The former husband complains that he was not provided a copy of the proposed order prior to its entry. Assuming that is so, that is not a basis for reversal. This order was preceded by at least two similar orders directing the former husband to reimburse educational expenses for earlier time periods. It was clear from the court's remarks at the April 7 hearing that the court intended to pattern the July 17 order after the orders entered previously, and the court did so.

IV.

The former husband argues that the trial court erred by refusing to approve a statement of proceedings under Florida Rule of Appellate Procedure 9.200(b)(4). During the pendency of this appeal, the former husband prepared a proposed statement of the proceedings for the hearing which took place on August 27, 2002. This is the hearing which resulted in the order of March 4, 2003 awarding attorney's fees to the former wife. The guardian ad litem objected to the proposed statement of proceedings.

The trial court declined to approve the statement of proceedings. The former husband moved to compel Judge Lando (who conducted the August 27, 2002 hearing) to settle the statement of proceedings. See Fla. R. App. P. 9.200(b) (4). This court treated the former husband's motion to compel as a petition for writ of mandamus and, after receiving a response, denied it. The former husband has renewed the point in his brief.

As explained earlier in this opinion, the March 4, 2003 order has become final and is not subject to collateral attack in this appeal. The time to have submitted a statement of proceedings for the August 27, 2002 hearing would have been in connection with the earlier appeal of the March 4, 2003 order, not the present appeal.

V.

The former wife has filed a Motion for Sanctions in which she seeks to preclude the husband from any further self-representation in this court without being represented by counsel. The former wife contends that the husband's appeals have repeatedly been shown to be without merit and have constituted an abuse of the legal process. Upon consideration of the motion, the former husband's response filed January 5, 2004, and after review of this court's files, we agree.[5]

The Florida Supreme Court has said:

> Abuse of the legal system is a serious matter, one that requires this Court to exercise its inherent authority to prevent. As we held in *Rivera v. State*, 728 So.2d 1165, 1166 (Fla.1998): "This Court has a responsibility to ensure every citizen's access to courts. To further that end, this Court has prevented abusive litigants from continuously filing frivolous petitions, thus enabling the Court to devote its finite resources to those who have not abused the system."
>
> Although rare, we have not hesitated to sanction petitioners who abuse the legal process by requiring them to be represented by counsel in future actions. In *Jackson v. Florida Department of Corrections*, 790 So.2d 398 (Fla.2001), the sanction of requiring a member of The Florida Bar to sign all of petitioner's filings with this Court and dismissing all other pending cases was imposed on a litigious inmate who repeatedly filed frivolous lawsuits that disrupted the Court's proceedings. In *Martin v. State*, 747 So.2d 386, 389 (Fla.2000), the sanction was imposed against a petitioner who, like *Lussy*, repeatedly

> filed lawsuits that included personal attacks on judges, were "abusive," "malicious," "insulting," and demeaning to the judiciary. In *Attwood v. Singletary*, 661 So.2d 1216 (Fla.1995), the petitioner was sanctioned for filing numerous frivolous petitions, including one that was filed shortly after the Court's order to show cause was issued.
>
> Like the individual in *Attwood*, Lussy has abused the processes of this Court with his constant filings. Accordingly, a limitation on Lussy's ability to file would further the constitutional right of access because it would permit this Court to devote its finite resources to the consideration of legitimate claims filed by others. See generally *In re McDonald*, 489 U.S. 180, 184, 109 S.Ct. 993, 103 L.Ed.2d 158 (1989) (finding that "[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources").

Lussy v. Fourth District Court of Appeal, 828 So.2d 1026, 1027 (Fla. 2002); see *Slizyk v. Smilack*, 734 So.2d 1166 (Fla. 5th DCA 1999); *Platel v. Maguire, Voorhis & Wells, P.A.*, 436 So.2d 303 (Fla. 5th DCA 1983); *Shotkin v. Cohen*, 163 So.2d 330 (Fla. 3d DCA 1964); see also *Safir v. United States Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986).

In *Safir* the court stated:

> [I]n determining whether or not to restrict a litigant's future access to the courts, [a court] should consider the following factors: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or

> duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g. does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

792 F.2d at 24.

The fact that the former husband is an attorney does not insulate him from this analysis. On a proper showing, an attorney may be barred from self-representation. See *Slizyk*, 734 So.2d at 1167.

The parties were divorced in 1994. Several years later, post judgment disputes arose, leading to litigation of increasing intensity. The former husband was eventually incarcerated for civil contempt for failing to pay child support. See *Sibley v. Sibley*, 833 So.2d 847 (Fla. 3d DCA 2002), *review denied*, 854 So.2d 660 (Fla. 2003), *cert. denied*, 124 S. Ct. 1094 (2004). In correspondence between the former husband and the former wife, the former husband stated, "And if you want to attempt to squeeze me until I am dry, we will litigate until I am disbarred and bankrupt if necessary for you leave me no other choice."

The former husband, an attorney, has initiated twenty-five appellate proceedings in this court in which he has represented himself, and has filed two more in which he was represented by counsel. These are listed in the Appendix to this opinion. The former husband prevailed in an early appeal to this court. See *Sibley v. Sibley*, 710 So.2d 1017 (Fla. 3d DCA 1998) . However, the former husband's subsequent *pro se* proceedings in this court have been found to have no merit. As is shown by this appeal,

the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so.

In addition, the former husband has filed at least twelve actions in federal court against judges who have been assigned to his cases, the court system, and the former wife. In *Sibley v. Wilson*, No.04-21000-CIV-MORENO, the federal court catalogued the former husband's federal litigation history as follows:

> The Plaintiff's divorce case from ex-wife Barbara Sibley . . . has been ongoing since 1994. The case appears to have been bitter, as evidenced by Plaintiff's numerous filings of separate actions related to issues in the divorce proceeding, including:
>
> 1. *Sibley v. Judge Maxine Cohen Lando*, United States District Court, Southern District of Florida Case No. 01-2940-CIV-UNGARO-BENAGES
>
> Summary: allegations of constitutional violations by judge Outcome: dismissed on basis of *Younger* abstention [aff'd, 37 Fed. Appx. 979 (11th Cir. 2002)].
>
> 2. *Sibley v. Judges David Gersten, Juan Ramirez, and Joseph Nesbitt*, United States District Court, Southern District of Florida Case No. 00-3665-CIV-MORENO
>
> Summary: allegations of constitutional violations by judges Outcome: dismissed on basis of judicial

immunity, lack of subject-matter jurisdiction [aff'd, 252 F.3d 443 (11th Cir.), cert. denied, 534 U.S. 827 (2001)].

3. *Sibley v. Mark Martinez,* United States District Court, Southern District of Florida Case No. 02-22931-CIV-HIGHSMITH

Summary: allegations of constitutional violations by Clerk's filing process Outcome: dismissed for lack of constitutional violation.

4. *Sibley v. Judges Alan Schwartz, David Gersten, Mario Goderich, Gerald Cope, Robert Shevin, Maxine Cohen Lando, Victoria Platzer, and Barbara Sibley,* United States District Court, Southern District of Florida Case No. 01-2746-CIV-KING

Summary: allegations of constitutional violations by judges Outcome: dismissed on basis of *Younger* abstention, lack of subject-matter jurisdiction. Rule 11 sanctions imposed against Plaintiff [aff'd, 45 Fed. Appx. 878 (11th Cir. 2002)].

5. *Sibley v. Sibley,* United States District Court, Southern District of Florida Case No. 01-2770-CIV-HUCK

Summary: allegations of interference with parent-child relationship by ex-wife Outcome: dismissed on basis of lack of subject-matter

jurisdiction [aff'd, 34 Fed. Appx. 969 (11th Cir. 2002)].

6. *Sibley v. Sibley,* United States District Court, Southern District of Florida Case No. 01-1349-CIV-GOLD

Summary: removal of divorce action from Judge Lando's court Outcome: remanded on basis of lack of subject-matter jurisdiction.

7. *Sibley v. Spears*, United States District Court, Southern District of Florida Case No. 02-22106-CIV-JORDAN

Summary: petition for habeas corpus regarding contempt orders Outcome: dismissed for lack of subject-matter jurisdiction.

8. *Sibley v. Judge Maxine Cohen Lando*, United States District Court, Southern District of Florida Case No. 03-20942-CIV-HUCK

Summary: allegations of violations of right of access to the courts Outcome: dismissed on basis of *Rooker-Feldman* and *Younger* abstentions [aff'd, 99 Fed. Appx. 886 (11th Cir. 2004)].

9. *Sibley v. Florida Supreme Court, Harry Lee Anstead, Third District Court of Appeal, and Eleventh Judicial Circuit Court of Dade County*, United States District

Court, Southern District of Florida Case No. 03-21199-CIV-LENARD

Summary: allegations of equal protection violations in decisions by Florida courts Outcome: dismissed sua sponte for lack of subject-matter jurisdiction.

10. *Sibley v. Maxine Cohen Lando,* United States District Court, Southern District of Florida Case No. 03-21885-CIV-HUCK

Summary: allegations of equal protection violations in divorce proceedings Outcome: dismissed on basis of *Rooker-Feldman* and *Younger* abstentions [aff'd, Fed. Appx. 907 (11th Cir.), cert. denied, 124 S. Ct. 2885 (2004)].

The Plaintiff has also filed a lawsuit against his wife in federal court in Delaware which was dismissed for lack of subject matter jurisdiction (Case No. 8:00-cv-02997-JFM), and has filed a number of appeals and/or petitions before Florida state courts as well.

Sibley v. Wilson, No. 04-21000-CIV-MORENO, slip op. at 2-3 (S.D. Fla. July 7, 2004) .

In dismissing *Sibley v. Wilson*, Judge Moreno said that it is "the court's recognized right and duty, in both Federal and Florida state courts, to protect their jurisdiction from vexatious litigants and abuse of the judicial system." Id. at 6 (citations omitted). We agree.

The former husband has served as an unending source of

vexatious and meritless litigation. This has caused needless consumption of resources by the court system and needless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them.

We conclude that the standards of *Lussy* are met. We have considered the criteria set forth in the *Safir* decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court.

We direct the clerk of this court to reject any further filings in this court on the former husband's behalf unless signed by a member of the Florida Bar (other than the former husband). Any other cases that are pending in this court in which the former husband is representing himself will be dismissed unless a notice of appearance signed by a member in good standing of the Florida Bar (other than the former husband) is filed in each case within thirty days of this opinion becoming final. See *Lussy*, 828 So.2d at 1028.

VI.

For the stated reasons, the orders now under review are affirmed. The former wife's motion for sanctions is granted. The former husband is precluded from further self-representation in this court.

Affirmed; sanctions granted.

APPENDIX

(Sibley v. Sibley Case No. 3D03-2083)

A. Completed proceedings in which the former husband has represented himself:

1) *Sibley v. Sibley*, 866 So.2d 1223 (Fla. 3d DCA

2003) *cert. denied*, 124 S. Ct. 2909 (2004);

2) *Sibley v. Sibley*, No. 03-1392 (Fla. 3d DCA Aug. 6, 2003;

3) *Law Offices of Rodriguez & Sibley v. Sibley*, No. 03-3090 (Fla. 3d DCA Dec. 12, 2003;

4) *Sibley v. Sibley*, 835 So.2d 1140 (Fla. 3d DCA 2002) (01-3496);

5) *Sibley v. Sibley*, 833 So.2d 143 (Fla. 3d DCA 2002), reh'g denied, 835 So.2d 1140(Fla. 3d DCA 2002);

6) *Sibley v. Sibley*, 831 So.2d 193 (Fla. 3d DCA 2002) (02-2764);

7) *Sibley v. Sibley*, 831 So.2d 193 (Fla. 3d DCA 2002) (02-2190), *reh'g denied*, 835 So.2d 1141 (Fla. 3d DCA 2 0 02);

8) *Sibley v. Sibley*, 831 So.2d 192 *Sibley v. Sibley*, (02-412);

9) *Sibley v. Sibley*, 823 So.2d 785 (Fla. 3d DCA 2002);

10) *Sibley v. Sibley*, 816 So.2d 136 (Fla. 3d DCA 2002);

11) *Sibley v. Sibley*, 815 So.2d 673 (Fla. 3d DCA 2002), *rev. denied*, 833 So.2d 774 (Fla. 2002);

12) *Sibley v. Sibley*, 814 So.2d 1054 (Fla. 3d DCA 2002);

13) *Sibley v. Sibley*, 803 So.2d 738 (Fla. 3d DCA

2001);

14) *Sibley v. Sibley*, 795 So.2d 71 (Fla. 3d DCA 2001);

15) *Sibley v. Sibley*, 793 So.2d 959 (Fla. 3d DCA 2001);

16) *Sibley v. Sibley*, 791 So.2d 481 (Fla. 3d DCA 2001);

17) *Sibley v. Sibley*, 771 So.2d 1175 (Fla. 3d DCA 2000);

18) *Sibley v. Sibley*, 751 So.2d 586 (Fla. 3d DCA 2000);

19) *Sibley v. Sibley*, 733 So.2d 529 (Fla. 3d DCA 1999);

20) *Sibley v. Sibley*, 732 So.2d 1079 (Fla. 3d DCA 1999);

21) *Sibley v. Sibley*, 725 So.2d 1273 (Fla. 3d DCA 1999);

22) *Sibley v. Sibley*, 710 So.2d 1017 (Fla. 3d DCA 1998).

B. Pending appellate proceedings in which the former husband represents himself:

23) *Sibley v. Sibley*, Case No. 3D04-294;

24) *Sibley v. Sibley*, Consolidated Case No. 3D04-1260/3D04-803;

25) *Sibley v. Sibley*, Case No. 3D04-1466.

C. Completed appellate proceedings in which the former husband was represented by counsel:

26) *Sibley v. Spears*, 837 So.2d 988 (Fla. 3d DCA 2002) *cert denied,* 124 S.Ct. 567 (2003);

27) *Sibley v. Sibley*, 833 So.2d 847 (Fla. 3d DCA 2002), *review dismissed*, 854 So.2d 660(Fla. 2003), *cert. denied,* 124 S. Ct. (2004).

Notes:

[1] The order was signed on March 4 and filed on March 6, 2003. The former wife refers to it as the March 4, 2003 order and the former husband refers to it as the March 6, 2003 order. We will use the March 4, 2003 date.

[2] In requesting reimbursement, the guardian ad litem (as trustee) reasons that where the former husband has undertaken responsibility to pay the educational expenses, the children's trusts should not be diminished for that purpose.

[3] For the same reason, the thirty-day rule does not apply to the former husband's subsequent motion to disqualify Judge Lando filed June 12, 2003. Further, even if that were not so, we would reject the former husband's argument on authority of *Fischer v. Knuck*, 497 So.2d 240 (Fla. 1986). The *Fischer* decision states, "When a judge has heard the testimony and arguments and rendered an oral ruling in a proceeding, the judge retains the authority to perform the ministerial act of reducing that ruling to writing." 497 So.2d at 243 (citations omitted) . The July 17 order accurately reflects the oral ruling at the April 7 hearing.

[4] There is a scrivener's error in the title of the July 17 order. The order states that it is an "Order Granting Former Wife's Ore Tenus and Emergency Motion for Contempt for Failure to Pay Educational Expenses . . . ." As the motion did not request the remedy of contempt for failure to pay educational expenses, the title of the order is incorrect to that extent. The body of the order, however, is correct and accurately reflects the trial court's ruling. The former husband may request that the trial court correct the title of the order.

[5] The former wife requested oral argument of the motion and we granted the request.

IN THE DISTRICT COURT OF APPEAL OP FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 2004
DECEMBER 8, 2004
CASE NO.: 3D03-2083
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,

Appellant,

v.

BARBARA SIBLEY,

Appellee.
_____/

An appeal from the Circuit Court for Dade County, Thomas S. Wilson, Jr., and Maxine Cohn Lando, Judges.

Montgomery Blair Sibley, in proper person.
Jay M. Levy; Bette E. Quiat, for appellee.

Before COPE, GERSTEN and GREEN, JJ.
On Motion for Rehearing

PER CURIAM.

We grant the motion for rehearing in one respect, and deny the remainder of the motion.

The former husband argues that under the terms of this court 's opinion dated November 3, he is precluded from filing a pro se motion to invoke the discretionary review jurisdiction of the Florida Supreme Court. That is so because this court's opinion directs "the clerk of this court to reject any further filings

in this court on the former husband's behalf unless signed by a member of the Florida Bar (other than the former husband)." Opinion at 18.

This court has permitted the former husband to file a pro se motion for rehearing and rehearing en bane in this case. Consistent with that procedure, we modify our opinion of November 3, 2004 to permit the filing of a pro se notice to invoke discretionary jurisdiction of the Florida Supreme Court, should the former husband choose to do so.

The former husband maintains that this court should not have quoted his correspondence to his former wife, arguing that the quoted correspondence is not in the record of this appeal. That point is without merit. We clearly stated in our opinion of November 3 that for purposes of part V of the opinion, this court reviewed its files in all of the former husband's prior appellate proceedings. The quoted letter is found in Sibley v. Sibley, No. 3D02-3171, Appendix to Appellee's Answer Brief.

We deny rehearing on the remaining points without further discussion.

Rehearing granted in part, denied in part.

IN THE DISTRICT COURT OF APPEAL OP FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 2004
DECEMBER 8, 2004
CASE NO.: 3D03-2083
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,

Appellant,

v.

BARBARA SIBLEY,

Appellee.
_____/

Upon consideration, appellant's motion for rehearing en banc is denied.

COPE, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN, WELLS, and SHEPHERD, JJ., concur. SCHWARTZ, C.J., and LEVY, and RAMIREZ, JJ., recused.

CC:
Montgomery Blair Sibley
Bette Ellen Quiat
Jay M. Levy

SUPREME COURT OF FLORIDA

TUESDAY, MAY 15, 2005

CASE NO.: SC05-11

MONTGOMERY BLAIR SIBLEY

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.
_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(4). Respondent's motion for attorney's fees is provisionally granted in the amount of $2,500.00, conditioned on the trial court's finding a fee award appropriate in light of the parties' respective financial need and ability to pay.

PARIENTE, C.J., and WELLS, ANSTEAD, CANTERO and BELL, JJ., cocncur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION CASE NO. 04-22984-CIV-JORDAN

MONTGOMERY BLAIR SIBLEY,

Plaintiff,

vs.

GERALD B. COPE, JR., MELVIA B. GREEN, DAVID M. GERSTEN, DAVID L. LEVY and ROBERT L. SHEVIN both in their capacities as Judges of the Florida Third District Court of Appeal and personally, and MARY CAY BLANKS, Clerk of the Florida Third District Court of Appeal, solely in her capacity as Clerk of that Court,

Defendants.
_____/

Order Denying Motion for Temporary Injunction

For the reasons which follow, and after consideration of the arguments presented by the parties at the hearing held on February 25,2005, and the memoranda of law filed after that hearing, the motion for a temporary injunction [D.E. 2] filed by Montgomery Blair Sibley (individually and on behalf of his son, Alexander Blair Sibley) and Rodriguez& Sibley, LLP (the plaintiffs) is DENIED.[1]

1

The plaintiffs have served me with a copy of a petition for a writ of mandamus recently filed in the Eleventh Circuit,

Background

The request for temporary injunctive relief- solely with respect to Mary Cay Blanks, the Clerk of the Florida Third District Court of Appeal - has its genesis in opinions and orders issued by the Third District in a dissolution case involving Mr. Sibley and his former wife, Barbara Sibley.[2] In Sibley v. Sibley, 885 So.2d 980 (Fla, 3d DCA 2004) (Sibley I), the Third District

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in which they complain of my delay in ruling on the motion for a temporary injunction. For whatever it is worth, the delay is due in part to the plaintiffs' filing of an amended complaint. The plaintiffs filed their amended complaint on February 24, 2005, the day before the hearing. The defendants moved to dismiss the amended complaint on March 7,2005. The plaintiffs responded on March 17, 2005, and the defendants replied on March 28, 2005. In short, the memoranda on the merits of the amended complaint - a matter which goes to whether the plaintiffs can establish a substantial likelihood of success on the merits - have been ripe for only two weeks. In addition, I finished a 9-week criminal trial on March 24,2005. See United States v, Garrido, No. 04-20059-Cr-Jordan.

2

The plaintiffs have alleged numerous claims for damages and for declaratory relief against state judges, the Third District, and the State of Florida in their amended complaint. The ultimate merit of these claims are not the subject of this order, which is limited to the plaintiffs' request for injunctive relief. Interestingly, the amended complaint contains no claims whatsoever for injunctive relief.

rejected numerous arguments advanced by Mr. Sibley, and affirmed various rulings made by the trial court (e.g., ordering Mr. Sibley to pay Ms. Sibley's attorney's fees, requiring Mr. Sibley to reimburse Ms. Sibley for the tuition expenses of two of the children).

In that same appeal, Ms. Sibley filed a motion for sanctions against Mr. Sibley, who is an attorney. She asked that Mr. Sibley be "preclude[d] from any further self-representation in [the Third District] without being represented by counsel." Id. at 985. The Third District, after considering Mr. Sibley's response to the motion, and after hearing oral argument on the motion, id. at 985 n. 5, found that Mr. Sibley's actions constituted an "abuse of the judicial process" under the standards set forth in *Lussy v. Fourth District Court of Appeal*, 828 So.2d 1026, 1027 (Fla. 2002), and *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 19S6). Specifically, the Third District noted the following: (1) Mr. Sibley had written to Ms. Sibley "[I]f you want to attempt to squeeze me until I am dry, we will litigate until I am disbarred and bankrupt if necessary for you leave me no other choice;" (2) Mr. Sibley had initiated 25 appellate proceedings in the Third District in which he represented himself, and that except for prevailing in one early appeal in 1998, his "subsequent pro se proceedings in this court have been found to have no merit;" and (3) Mr. Sibley had filed 12 actions in federal court against state judges who had been assigned to his cases, Ms. Sibley, and the state court system, none of which had ultimately succeeded. *Sibley I*, 885 So.2d at 986. Accordingly, the Third District granted the motion for sanctions:

> The former husband has served as an unending source of vexatious and meritless litigation. This has caused needless consumption of resources by the court system andneedless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them.

> We conclude that the standards of Lussy are met. We have considered the criteria set forth in the Saflr decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court.
>
> We direct the clerk of this court to reject any further filings in this court on the former husband's behalf unless signed by a member of the Florida Bar (other than the former husband). Any other cases that are pending in this court in which the former husband is representing himself will be dismissed unless a notice of appearance signed by a member in good standing of the Florida Bar (other than the former husband) is filed in each case within [30] days of this opinion becoming final. See *Lussy*, 828 So.2d at 1028.

Sibley I, 885So.2d at 988.

Two days after the Third District had issued its opinion in *Sibley I*, Mr. Sibley filed a petition for a writ of mandamus on behalf of himself and his law partnership. The Clerk had returned the petition to Mr. Sibley in accordance with *Sibley I*. Mr. Sibley moved for reconsideration of *Sibley I*, and the Third District issued another opinion. *Sibley v. Sibley*, 2004 WL 27260 13 (Fla. 3d DCA Nov. 24, 2004) (*Sibley II*). In *Sibley II*, the Third District agreed with Mr. Sibley that *Sibley I* was not final when he filed the mandamus petition, and that *Sibley I* "did not spell out that the prohibition on future filings was to be effective immediately." *Sibley II*, 2004 WL 2726013, at *1. As a result, the Third District gave Mr. Sibley 20 days in which to refile the mandamus petition, but ruled that the petition would be subject to the "pending cases" rule set forth in *Sibley I*, In other words, Mr. Sibley could file the mandamus petition pro se, but had to obtain separate counsel within 30 days of *Sibley I* becoming final. *Id.* In addition, the Third District ruled that the mandamus

petition, although filed on behalf of his law partnership, fell within the prohibition on self-presentation because "Mr. Sibley's representation in this circumstance is simply self-representation in another form. We clarify that the ... prohibition on self-representation includes a prohibition on Mr. Sibley's representation of his law partnership." *Id.*

Mr. Sibley again moved for rehearing. The Third District granted rehearing in one respect, explaining that it had allowed Mr. Sibley to proceed pro se in seeking rehearing and rehearing en bane. It also held that Mr. Sibley would be allowed to file a pro se notice to invoke the discretionary jurisdiction of the Florida Supreme Court, if he chose to do so. Finally, it explained, in response to Mr. Sibley 's objection, that the letter from Mr. Sibley to Ms. Sibley quoted in *Sibley I* had been taken from the appendix to a brief in one of Mr. Sibley's earlier appeals. *Sibley v. Sibley*, 2004 WL 2823179 (Fk 3d DCA Dec. 8, 2004) (*Sibley III*). On that same day, the Third District denied rehearing *en banc. Sibley v. Sibley*, 892 So.2d 1042 (Fla. 3d DCA Dec. 8, 2004) (table).

The Third District's decision became final on January 5, 2005. Mr. Sibley filed a notice of discretionary jurisdiction with the Florida Supreme Court, According to a notice of supplemental authority recently filed by the plaintiffs, the Third District has since dismissed three appeals based upon *Sibley I* - two appeals by Mr. Sibley and one by his son.

Discussion

Mr. Sibley seeks the following temporary injunctive relief: an order temporarily enjoining Ms. Blanks from rejecting any further pro se filings by Mr. Sibley; an order temporarily enjoining Ms. Blanks from dismissing any cases pending in the Third District in which Mr, Sibley is representing himself without separate counsel; and an order temporarily enjoining Ms. Blanks from returning pleadings filed by Mr. Sibley on behalf of

Rodriguez & Sibley, LLP, Mr. Sibley makes the following general arguments on the merits in support of his motion for temporary injunctive relief: (1) the Third District's orders restricting future pro se filings unconstitutionally restrict his access to the courts under federal law; (2) the Third District's orders unconstitutionally restrict his access to the courts under Florida law; (3) the Third District's orders were not supported by appropriate findings; (4) the Third District's orders de facto prevent him from access to the federal courts; (5) the Third District did not give him adequate notice of the possible sanctions; and (6) the Third District judges - Judges Cope, Green, and Gersten - exceeded their jurisdiction.

A preliminary injunction or temporary restraining order is a drastic and extraordinary remedy, and is not to be granted unless the movant has met its burden. *Four Seasons Hotels & Resorts v. Consorcio Ban, S.A.*, 320 F.3d 1205,1210 (11th Cir. 2003). The standard for temporary injunctive relief is a familiar one, The plaintifis here must show (a) that they have a substantial likelihood of success on the merits; (b) that the injunction is necessary to prevent irreparable injury; (c) that the threatened injury to them outweighs the harm that the injunction would cause the non-movants (e.g., Ms. Sibley); and (d) that the injunction is not adverse to the public interest. *Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032, 1034-35 (11th Cir. 2001).

Substantial Likelihood of Success on the Merits. The plaintiffs have not shown a likelihood of success of the merits, and certainly have not shown a substantial likelihood of success on the merits.

First, in order for me to grant the plaintiffs the injunctive relief they seek, I would have to declare or hold that the Third District's restriction against future pro se filings was unconstitutional. In other words, 1 would have to sit in review of the Third District's ruling. As a judge on an inferior federal

court, however, that is not something 1 can do. Under the so-called *Rooker-Feldman* doctrine,[3] a district court cannot adjudicate "cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 2005 WL 711586, *__ (U. S. March 30,2005) (publication page references not available). See also id. at *__ (explaining that in both Rooker and Feldman "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment" under federal question jurisdiction). The plaintiffs here are "state court losers" who are complaining of injuries caused by a state court ruling issued before the federal action was filed. When I asked Mr. Sibley at the hearing about the applicability of the *Rooker-Feldman* doctrine, one of his responses was that I was not bound by Supreme Court precedent that was, in his view, contrary to the Rules Enabling Act and 28 U.S.C. § 157.[4] That is not an argument I can accept. A district

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[3] See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983).

[4] The plaintiffs make a similar argument in their memoranda of law. See Memorandum of Law in Opposition to Motion to Dismiss Amended Complaint [D.E. 64] at 7-8 ("[N]either Congress nor the Supreme Court is clothed with authority to limit this court's jurisdiction..,, As such, federal law - in particular ... 28 U.S.C. § 1257 and the Supreme Court's *Rooker-Feldman* and *Younger* doctrines - cannot limit this court's jurisdiction to hear this matter if 'judicial power may be exercised.'").

judge cannot refuse to follow binding Supreme Court precedent, even if he believes that it is incorrect.

Second, assuming the *Rooker-Feldman* doctrine does not apply, the plaintiffs still have not shown a substantial likelihood of success on the merits. Insofar as the plaintiffs challenge the factual basis for the restriction, the Third District found that Mr. Sibley had filed over 20 appeals that did not have merit and that he had filed approximately 10 federal actions (against state judges, Ms. Sibley, and the state court system) which had not been successful. The Third District also found that Mr. Sibley "has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so." *Sibley I*, 885 So.2d at 986. The Third District may not have used the word frivolous, but its decision indicates that it found that Mr. Sibley's prolific litigation was, with one exception, meritless, vexatious, and abusive. And the Third District considered the fact that lesser sanctions like attorney's fees had not been effective, as Mr. Sibley had "not paid them." *Id.* at 988.

Third, although the plaintiffs suggest that a restriction like the one imposed by the Third District can only be imposed when a litigant has filed dozens and dozens and dozens of frivolous actions or pleadings, the Supreme Court itself has barred pro se litigants from certain future filings based upon a record similar to Mr. Sibley's. See, e.g., *Judd v. U.S. District Court for the Western District of Texas*, 588 U.S. 5, 6 (1999) (petitioner barred from filing future pro se/in forma pauperis petitions for certiorari or petitions for extraordinary writs in non-criminal cases - petitioner had previously filed 11 petitions for certiorari which were frivolous and had been denied without dissent).

Fourth, to the extent that the plaintiffs argue that they

did not have proper notice of the possible restriction on future filings, that argument lacks merit. In the context of court-imposed sanctions, due process "requires only that the sanctionee have fair notice of the possible imposition of sanctions and an opportunity to respond orally or in writing." *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277,1294 n. 14 (11 th Cir. 2002). The plaintiffs had a copy of Ms. Sibley's motion for sanctions and were able to respond in writing. In addition, the Third District granted oral argument on the motion and heard from Mr. Sibley orally on the matter. Finally, the Third District allowed Mr. Sibley to seek rehearing and in fact modified the restriction after considering his submissions.

Fifth, the restriction imposed by the Third District is not absolute. It does not bar the plaintiffs from seeking review in the Third District, but only requires that the plaintiffs be represented by a member in good standing of the Florida Bar. "The only restriction that [the Eleventh] Circuit has placed upon injunctions designed to protect against abusive and vexatious litigation is that a litigant cannot be 'completely foreclosed from any access to the court.'" *Martin-Trigona v. Shaw,* 986 F.2d 1384,1387 (11th Cir. 1993) (quoting *Procup v. Strickland,* 792 F.2d 1069,1074 (1 IthCir. 1986) (*en banc*)}. The plaintiffs argue that Mr. Sibley does not have the financial ability to hire counsel, based on the affidavit Mr. Sibley filed, which states that he has only $6,560 in assets. But on this record, it is just as likely, as Mr. Sibley also states in his affidavit, that he cannot obtain counsel because of his prior history and reputation. As he put it, various attorneys refused to speak to him "given [his] reputation before [the Third District.]" In short, Mr. Sibley has not convinced me that his inability to retain counsel is due to his financial situation.

Sixth, although the temporary injunction requested by the plaintiffs purportedly runs only against Ms. Blanks, the Clerk of the Third District, it is based on constitutional violations allegedly committed by the judges of the Third District. In other

words, the plaintiffs' requested temporary injunction is in effect an injunction preventing the judges of the Third District from "entering and enforcing" the order issued in Sibley /restricting future filings. But after its amendment in 1996, 42 U.S.C § 1983 does not permit injunctive relief "against a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." See *Bolin v. Story*, 225 F.3d 1234,1242 (11th Cir. 2000). Judges Cope, Green, and Gersten are not alleged to have violated any declaratory decree.

Seventh, as the amended complain makes clear, the plaintiffs' claims with respect to the order restricting future filings are based on attempts to obtain a declaratory decree (really an injunction under the guise of a declaratory decree) under 28 U.S.C. § 2201 and 42 U.S.C. § 1983. In cases brought for declaratory judgment under § 2201, a district court has discretion as to whether, and when, to hear the action. The assumption of jurisdiction is not automatic. Furthermore, in the declaratoryjudgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration. See *Wilton v. Seven Falls Co*,, 515 U,S. 277, 282-88 (1995). On this record, I would likely decline to exercise jurisdiction over the declaratoryjudgment claims attacking the order issued in *Sibley I.* And even if the plaintiffs' requested declaratory decree would not be prohibited by the *Rooker-Feldman* doctrine, those cases certainly counsel against accepting jurisdiction over Mr. Sibley's proposed declaratory judgment claim. Finally, even if the declaratory judgment claims are considered exclusively under § 1983, and not § 2201, I would still decline to exercise jurisdiction. The Eleventh Circuit has explained that principles of "federalism and comity" apply to requests for declaratory relief under § 1983. See *McKitsickv. City of Melbourne*, 96 F.3d478,489 n.7 (11th Cir. 1996). These principles counsel against the issuance of a declaratory judgment by a federal district court questioning the validity of a state court appellate

decision, particularly in light of the fact that Mr. Sibley has made it a regular practice to sue, in federal court, the state judges who rule adversely to him in his dissolution case.[5]

Eighth, Judges Cope, Green, and Gersten did not act outside their jurisdiction. Florida courts have the inherent authority to impose sanctions for bad faith conduct on parties

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[5] See, e.g., *Sibley v. Gerstein et al*, No, 00-3 66 5 -Civ-Moreno (dismissed on judicial immunity & lack of subject-matter jurisdiction grounds), *aff'd*, No. 00-15833 (llth Cir. March 13, 2001); *Sibley v, Schwartz et al*, No. 01-2746-Civ-King (dismissed on *Younger* grounds / discretionary refusal to entertain declaratory judgment claim), *aff'd*, No. 01-16571 (llth Cir. June 21, 2002); *Sibley v. Lando*, No. 01-2040-Civ-Ungaro (dismissed on *Younger* grounds), *aff'd*, No. 01-15644 (11th Cir. May 23,2002); *Sibley v. Lando*, No. 03-20942-Civ-Huck (dismissed on *Rooker-Feldman* and *Younger* grounds), *aff'd*, No. 03-13340 (11th Cir. March 8,2004); *Sibley v. Anstead et al*, No. 03-21199-Civ-Lenard (dismissed for lack of subject-matter jurisdiction / no constitutional claims stated), *aff'd* on *Rooker-Feldman* grounds, No. 03-12824) (llth Cir. Oct. 23, 2003); *Sibley v. Lando*, No. 03- *Sibley v. Wilson*, No. 04-21000-Civ-Moreno (dismissed on judicial immunity and abstention grounds), *aff'd*, No. 04-13995 (11th Cir, March 18,2005). *See also Sibley v. Lando*, No. 03-21885-Civ-Huck (case brought by Mr. Sibley on behalf of his son / dismissed on *Rooker-Feldman* grounds), *aff'd*, No. 03-14915 (11th Cir. Feb. 20,2004); *Sibley v. Lando*, No. 03-21728-Civ-Jordan (dismissed on judicial immunity and qualified immunity grounds). As far as I can tell, Mr. Sibley has not been successful in any of these actions.

and attorneys. See *Moakleyv. Stnallwood*, 826 So.2d221,223-24 (Fla. 2002); *Bitterman v. Bitterman*, 714 So,2d356, 365 (Fla. 1998). This authority includes the power of an appellate tribunal to place limits on filings by pro se litigants like Mr. Sibley. See *Martin v. State*, 747 So.2d 386, 388-90 (Fla. 2000). Insofar as the plaintiffs are trying to impose personal liability on the Third District judges, that is likely to fail. Absolute judicial immunity under § 1983 applies to a "judge who dealt with the plaintiff in a judicial capacity and did not act in the 'clear absence of all jurisdiction.'" *Smith v. Shook*, 237 F.3d 1322, 1325 (11th Cir. 2001). Significantly, judicial immunity applies "even when the judge's acts are in error, malicious, or were in excess of his or her jurisdiction." *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000).

Irreparable Injury. The plaintiffs have, I think, shown irreparable injury. The Third District modified *Sibley I* so that Mr. Sibley could seek reconsideration pro se without separate counsel, allowed Mr. Sibley to file his mandamus petition pro se (with the caveat that he obtain counsel within 30 days of the Third District's decision becoming final), and allowed him to file a pro se notice to invoke the discretionary jurisdiction of the Florida Supreme Court. Nevertheless, the plaintiffs' recent notice of supplemental authority shows that the Third District recently dismissed three appeals filed by Mr. Sibley and his son based upon *Sibley I*. In the Eleventh Circuit, denial of access to the courts is enough to establish irreparable harm See *Harris Corp. v. Nat. Iranian Radio & Television*, 691 F.2d 1344, 1356-57 (llth Cir. 1982).

There is, however, a strange twist with respect to the question of irreparable injury. The plaintiffs seek only temporary injunctive relief through their motion, and their amended complaint does not contain any request whatsoever for injunctive relief (permanent or otherwise). Thus, in practical terms, the temporary injunction sought by the plaintiffs is really a permanent injunction without any ending point. What the

plaintiffs are trying to do is achieve, through the back door of a motion for temporary injunctive relief, a permanent injunction that they have not asked for in their amended complaint (except, as noted above, through the guise of a declaratory decree). As I see it, the plaintiffs are engaged in artful drafting - they know that claims for permanent injunctive relief against judges or the Third District may not be available under § 1983, so they have limited their request to temporary relief pursuant to a motion. Nevertheless, on balance, I find that the plaintiffs have sufficiently established irreparable injury.

Balance of Harms. This factor weighs slightly in favor of the plaintiffs. The harm to the plaintiffs in being unable to file and litigate pro se appeals is outweighs, by a small margin, the harm caused to the Third District and to Ms. Sibley in having to handle and respond to more pro se appeals which, given Mr. Sibley's prior history, are not likely to have much merit.

Public Interest An injunction would, in my view, be adverse to the public interest. The Supreme Court, the Eleventh Circuit, and the Florida Supreme Court, among others, have recognized that frivolous and vexatious filings by litigants constitute an abuse of the judicial process, waste scarce judicial resources, and force opposing litigants to pay more attorney's fees to defend or respond. My preliminary review of the record in this case, and of the other cases involving Mr. Sibley - the ones referenced in *Sibley I* and the ones listed in this order - indicates that the Third District's order was appropriate.

It is also important to note that the plaintiffs are not seeking a traditional preliminary injunction to preserve the status quo pending resolution of the merits. Instead, they are seeking to change the status quo - to set aside or enjoin the restriction against future pro se filings ordered by the Third District in *Sibley I.* See *Schiavo ex rel. Schindler v. Schiavo ex, rel. Schiavo,* 2005 WL 648897, *5 (11th Cir. 2005). Under these circumstances, and particularly where the plaintiffs do not seek

a permanent injunction in their amended complaint, the public interest is not served by entry of a temporary injunction.

Exercise of Equitable Discretion. In the event that I am wrong about those factors that I have resolved adversely to the plaintiffs, I exercise my equitable discretion to deny the request for temporary injunctive relief. A district court is not required to grant temporary injunctive relief automatically just because a movant establishes the four traditional prerequisites. Instead, the court is merely permitted to grant such relief upon such a showing. As the Supreme Court has explained: "The award of an interlocutory injunction by courts of equity has never been regarded strictly as a matter or right, even though irreparable injury may otherwise result to the plaintiff." *Yakus v. United States*, 321 U.S. 414, 440 (1944). See also *United States v, Edwards*, 333 F.2d 575, 578 (5th Cir. 1964) ("Even though irreparable injury may result to the plaintiff in the granting or refusal of preliminary injunctive relief, the judicial discretion of the trial court is not removed, and parties are not entitled to such relief as of right. Discretion in granting or refusing preliminary injunctions has been entrusted by the law to trial courts.") (citation omitted).

In my view, Mr. Sibley has improperly been using the Southern District of Florida to relitigate adverse rulings rendered by the Florida courts in his dissolution case, and has made it a practice to personally sue the judges who rule against him. This case is but another example of his modus operandi. Whatever may ultimately happen with respect to the merits of this case, I decline, as a judge sitting in equity, to enjoin the Third District, its judges, and officials from enforcing a judicial decree - of the type previously entered by the Supreme Court - entered after notice and an opportunity for Mr. Sibley to be heard. A temporary injunction at this stage would be an unwarranted interference with the proceedings of a state appellate tribunal, for the reasons set forth in the Supreme Court's recent decision in *Exxon Mobil*.

Conclusion The plaintiffs' motion for a temporary injunction [D.E. 2] is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 12th day of April, 2005.

Adalberto Jordan
United States District Judge

Copy to:
Magistrate Judge Klein
All counsel of record
Montgomery Blair Sibley, 560 Longhorn Crescent, Rockville, Maryland, tax: 202-478-0371